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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 558

SAMUEL G. JONES, SR., *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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SAMUEL G. JONES, SR., Appellant, prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit in the above entitled cause entered on the 10th day of October, 1960; on the 18th day of October, an order was entered extending the time within which to file this Petition to the 4th day of December 1960.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is printed at Page 1a of Appendix A to this Petition. The judgment and commitment of the District Court of the United States for the East-

ern District of Virginia, Norfolk Division, entered on the 9th day of June, 1959, appears on Page 6a of Appendix B hereto.

JURISDICTION

The decision of the Court below was entered on the 10th day of October, 1960 (Appendix A, Page One, *Infra*). Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

I. Whether due process of law guaranteed by the Fifth Amendment to the Constitution of the United States was denied to Petitioner and whether he was deprived of a fair trial by any or all of the following incidents occurring during the course of the trial.

(a) By the intense publicity and prejudice generated by local newspapers, prior to and during the trial proceedings.

(b) By the failure of the United States Attorney to present to the jury the computation of additional income taxes in accordance with his earlier representations that technical adjustments for capitalization, producing the major portion of the total deficiencies, were not to be regarded as willful or fraudulent; (notwithstanding such representations, the United States Attorney subsequently argued that the Petitioner willfully attempted to evade the taxes resulting from previously admitted non-fraudulent adjustments).

(c) By improper comments of the Trial Judge: these comments, made in the presence of the jury, are quoted herewith:

1. "Suppose I tell the jury that 'substantial' is a relative term. We, of course, are not dealing in this case with peanuts, I use the slang expression. . . ."

2. ". . . but as far as this Court is concerned, you (The Defendant) are going to adhere to the same rules that are applicable to anybody who appears in this courtroom and you are not above the law."

(d) By the Trial Court's denial of Petitioner's motions for a directed verdict of acquittal, one of which was made at the close of the Government's case and the other at the conclusion of the trial proceedings.

(e) By the Trial Court's admitting in evidence, over objection of Counsel for Petitioner, testimony of an alleged telephone conversation between Petitioner and another, supposedly held more than three years after the violation for which Petitioner was indicted.

(f) By the Trial Court's permitting the United States Attorney to use notes prepared by the Revenue Agents, during their investigation, for the purpose of refreshing the recollection of a witness, called by the District Attorney, relative to an alleged conversation between the Revenue Agents and the witness.

(g) By the introduction of certain evidence, inconsequential as to amount, with knowledge that its use would, in all probability, subject Petitioner to public ridicule; specifically, the United States Attorney used evidence relating to the purchase of suppositories by a corporation of which Petitioner was president and principal stockholder;

this evidence provoked bursts of laughter in the courtroom, in which the Judge and jury participated.

(h) By the phrasing of the Court's instructions in such manner as to prejudice and influence the jury.

(i) By the failure of the Trial Judge to instruct the jury to consider evidence favorable to the Petitioner, such as the undisputed fact that there were no omissions of gross income in the income tax returns filed by the corporation; this fact constituted part of the stipulations filed with the court.

(j) By the failure of the Trial Court to instruct the jury to disregard the additional taxes resulting from non-fraudulent accounting adjustments in determining the question of whether Petitioner willfully attempted to evade a "substantial" amount of income taxes.

II. Whether the cumulative effect of the foregoing injuriously affected the substantial rights of the Petitioner and thereby deprived him of a fair trial.

STATUTES INVOLVED

Title 26, U.S. Code, Section 7201;
Internal Revenue Code, 1954, Section 7201:

Attempt to Evade or Defeat Tax

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000.00, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

Title 26, U. S. Code, Section 145(b)

Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax

Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000.00, or imprisoned for not more than five years, or both, together with the costs of prosecution.

Federal Rules of Criminal Procedure:

Rule 30, *Instructions*

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider the verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Federal Rules of Criminal Procedure:

Rule 52(b), *Plain Error*

Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT

I. TRIAL

Petitioner was convicted by a jury in the United States District Court for the Eastern District of Virginia, Norfolk Division, on an indictment containing six counts; Petitioner was found guilty on each of the counts for willfully attempting to evade and defeat the payment of income taxes for the calendar years 1952, 1953, and 1954 in violation of Title 26, U. S. Code, Section 145(b) and Title 26, U. S. Code, Section 7201.

Counts 1, 3 and 5 of the indictment charged Petitioner with willfully attempting to evade and defeat a large part of his individual income taxes for the years 1952, 1953 and 1954 in the respective amounts of $22,821.62, $20,436.88 and $101,342.58 (R. 3-6) During the course of the trial, the Government introduced Exhibit 600 A reflecting adjustments to the Petitioner's individual tax liability whereby the amounts set forth in counts 1, 3 and 5 of the indictment were reduced to $4,086.16, $3,153.82 and $64,321.14 for the years 1952, 1953 and 1954 respectively; the difference between the deficiencies contained in the indictment and those presented by the Government during the trial proceedings are graphically illustrated in the following tabulation:

DEFICIENCIES IN DEFENDANT'S PERSONAL INCOME TAXES

Year	Per Indictment	Per Government Exhibit 600 A	Difference
1952	$ 22,821.62	$ 4,086.16	$18,735.46
1953	$ 20,436.88	$ 3,153.82	$17,283.06
1954	$101,342.58	$64,321.14	$37,021.44

Counts 2, 4 and 6 of the indictment charged the Petitioner with willfully attempting to evade and de-

feat a large part of the income taxes due by Berkley Machine Works & Foundry Company, a corporation of which Petitioner was president, by causing false and fraudulent returns to be filed for that corporation on which taxes were willfully evaded for the calendar years 1952, 1953 and 1954 in the respective amounts of $51,076.61, $65,329.73 and $46,173.00; (R. 3-6) evidence presented at the trial, by the Government (Exhibit 600B), contained adjustments whereby the deficiencies for the years 1952, 1953 and 1954 were reduced to $22,904.23, $30,830.97 and $20,184.10 for each of the years respectively; as in the case of the Petitioner's individual tax liabilities, the differences between the amounts set forth in the indictment and those reflected in Government's Exhibit 600 B are graphically illustrated in the following schedule:

DEFICIENCIES IN CORPORATE INCOME TAXES OF BERKLEY MACHINE WORKS & FOUNDRY COMPANY

Year	Per Indictment	Per Government Exhibit 600 B	Difference
1952	$51,076.61	$22,904.23	$28,172.38
1953	$65,329.73	$30,830.97	$34,498.76
1954	$46,173.00	$20,184.10	$25,988.90

The theory upon which the Government predicated its case was that Petitioner used corporate funds for his personal benefit and that, by virtue thereof, he received constructive dividends on which he willfully attempted to evade the taxes due thereon; this theory is to be distinguished from that of advances or loans by the corporation to the Petitioner which, it must be conceded, was not urged by the petitioner at the trial.

On the 18th day of May, 1959, the trial commenced in the United States District Court for the Eastern District of Virginia, Norfolk, Virginia, and continued

until the 28th day of May, 1959, during which time the Government produced 61 witnesses and introduced in evidence numerous exhibits and technical schedules aggregating approximately 1,000 in number.

A. Undisputed Evidence

The evidence established that Petitioner acquired control of Berkley Machine Works & Foundry Co. in 1919 and that continuously thereafter, he pursued a policy of extensive entertainment in promoting the business of manufacturing steel and iron castings for use in the railroad and ship building industries; toward this end, Petitioner, in the year 1951, purchased seven acres of land on Ocracoke Island, North Carolina; in the following year, he began the construction of a lodge known as Berkley Manor for accommodating customers and other guests of Berkley Machine Works & Foundry Co.; it was conceded by the Government that the construction and use of Berkley Manor was for corporate business (R. 49-53); the cost of constructing Berkley Manor, including labor, approximated the sum of $35,000.00 and was charged as an expense on the books of the corporation; as to this improper accounting, the United States Attorney conceded that the failure to capitalize the cost was not an act of fraud and was not to be regarded as willful (R. 52-53); a similar concession was made regarding certain items of machinery and equipment used by the corporation in the operation of its business (R. 49-52). These adjustments, admittedly free from willful intent, constituted approximately 82.20% of the total additional income for the calendar year 1952. For the year 1953, like adjustments accounted for approximately 77.91% of the total additional income. Rela-

tive to the calendar year 1954, the Government refused to concede that the cost of constructing a second building on Ocracoke Island, known as Samjo Manor, related to corporate business; this refusal was based on the fact that title to Samjo Manor was in the name of the Petitioner individually; the Petitioner, however, testified that Samjo Manor was to be used for the same purpose as that of Berkley Manor (R. 176), and the evidence established that the Petitioner had executed a deed to Samjo Manor in favor of the corporation but the formality of recordation and the payment of Federal stamp taxes had not been satisfied. (Def. Exh. #1, R. 28-31) The construction of Samjo Manor was not commenced until the year 1954, and the cost thereof had been entered on the books of the corporation as an expense instead of a capital asset subject to an allowance for depreciation; capitalization of this asset constituted 56.67% of the total additional income for the calendar year 1954.

Other evidence, adduced at the trial, demonstrated that Petitioner, in 1954, supplied materials in constructing a residence located in the village of Hatteras, North Carolina, identified as the Austin House; Mrs. Virginia Austin, the owner thereof, testified that she had entered into an oral agreement with the Petitioner whereby she agreed to permit customers and guests of Berkley Machine Works & Foundry Co., to use her home as accommodation during hunting and fishing seasons (R. 20-44); the evidence established, however, that the Austin House was never actually used by such guests or customers. According to the evidence, equitable title to Samjo Manor and the Austin House was in Berkley Machine Works & Foundry Co. (R. 267-268); as assets of the corporation, a fact not conceded

by the Government, adjustment for capitalization thereof constituted 96.12% of the total deficiency asserted against the Petitioner for the year 1954.

In 1924, Petitioner purchased a farm, consisting of approximately 290 acres, known as Sajo Farms, located on the outskirts of the city of Norfolk in Princess Anne County, Virginia; throughout the years 1952 to 1954 inclusive, Petitioner employed farm workers and tenant farmers in raising produce for sale; the Petitioner also maintained a workshop on the premises where he employed carpenters and cabinet makers in refinishing and or duplicating antique furniture in furnishing Berkley Manor during the years 1952 and 1953 and in furnishing Samjo Manor during the calendar year 1954. (R. 60-69).

B. Improper Comments by Trial Judge

During the trial proceedings, and in the presence of the jury, the Trial Judge made the following comments:

1. The Court: "Suppose I tell the jury that 'substantial' is a relative term. We, of course, are not dealing in this case with peanuts, I use the slang expression. What may be substantial in one case may be inconsequential in another. It depends upon what all the facts and circumstances are. I do not think, Mr. Campbell, that you or this witness, or even the Court, can put any iron-clad test on the word 'substantial'. I have gone into it a little bit myself and I find some of the courts have difficulty in stating exactly what the word 'substantial' means—" (R. 167)

2. The Court: . . . "but as far as this court is concerned, you are going to adhere to the same

rules that are applicable to anybody who appears in this courtroom . . .

The Witness: All right, sir.

The Court: . . . and you are not above the law.

The Witness: All right, sir." (R. 242)

C. Public Ridicule of Petitioner

1. While testifying on direct examination, Petitioner used the word "nigger"; the trial judge promptly excused the jury and ordered a recess during which he cited Petitioner for contempt of court. (R. 215) Spectators and newspaper reporters were permitted to remain in the courtroom and a full account of this proceeding was published in the evening newspapers.

2. During the presentation of its case, the United States Attorney introduced evidence relating to the purchase of a quantity of suppositories by Berkley Machine Works & Foundry Co.; (R. 210) although insignificant as to amount, the evidence itself provoked uproarious laughter in which the judge, jury and spectators joined; this incident was extensively publicized in the newspapers throughout the Norfolk, Virginia area.

D. Evidence Erroneously Admitted

Over objection of Counsel for Petitioner, the Trial Court admitted the following testimony in evidence:

1. A so-called Bride's Book containing entries which, as the witness testified, were made from notes and memoranda made by another who was not called as a witness. (R. 19)

2. The United States Attorney was permitted to use notes prepared by the Revenue Agents during the

course of their investigation for the avowed purpose of refreshing the recollection of a witness, called by the Government, pertaining to a conversation allegedly held between the Revenue Agents and the witness. (R. 39)

3. Evidence of an alleged telephone conversation between the Petitioner and a newspaper reporter purportedly held in the year 1957, or more than three years subsequent to the crime with which the Petitioner was charged. (R. 277-280)

E. Prejudicial Newspaper Publicity

The following excerpts from local newspapers of Norfolk, Virginia, are illustrative of the intense and prejudicial publicity directed against the Petitioner throughout the course of the trial:

THE VIRGINIAN PILOT—May 21, 1959

In Tax Evasion Trial

BUILDING JONES' 'BARONY' RETOLD
By Jim Henderson

NORFOLK—Houses his foundry's jack built were thoroughly reconstructed by witnesses Wednesday as the tax-evasion trial of industrialist Samuel G. Jones, Sr., ground on.

Federal attorneys attempted to lay a thread of incriminating logic through a labyrinth of words and documents in the third day of trial before U. S. District Court Judge Walter E. Hoffman and a jury of 12 regular and two alternate members.

Jones, 65, president of Berkley Machine Works and Foundry Co., has pleaded innocent to dodging nearly

$277,000 in personal and corporate income taxes for 1952, 1953 and 1954.

The government hopes to show Jones lived in baronial splendor, with a rural homeplace in Princess Anne County and three residences on North Carolina's Outer Banks, by using company funds for his own good.

Jones contends the money was spent to advance the business interests of the foundry of which he is majority stockholder.

* * * * * *

THE VIRGINIAN-PILOT—Friday, May 22, 1959
Norfolk-Portsmouth, Va.

EVEN DEFENDANT LAUGHS AT EVIDENCE AGAINST HIM

NORFOLK—The purchase of suppositories charged off to "sales promotion" expense on the books of Berkley Machine Works and Foundry Co., Inc., convulsed a courtroom Thursday night.

Even Berkley President Samuel G. Jones, Sr., being tried in U. S. District Court on tax-evasion charges, laughed when a federal Internal Revenue Service agent reached that item in his testimony.

A May 6, 1952, payment to Burrow-Martin Drug Stores by Berkley Machine Works was charged to "sales promotion expense," said Intelligence Agent Harry T. Lanier.

What purchase did the check represent? District Atty. John M. Hollis asked.

"That was for some . . . suppositories," Lanier said. The item is commonly used for relief of hemorrhoids.

The jury of 14 men—12 regular members and two alternates—whooped with delight.

Attorneys, defendant, witnesses and spectators joined in, as did Judge Walter E. Hoffman.

Defense Atty. Gordon E. Campbell protested that certain items recited by Lanier had not been brought out in previous testimony and therefore should be struck. He did not specify which he meant.

"I don't know how a corporation can use that one item that was mentioned," Hoffman agreed.

"I suspect if this case runs any longer the jury can use them," Campbell said.

Hoffman consented to Campbell's objection. "We've eliminated that one item," he said. "Let's go ahead."

THE VIRGINIAN-PILOT—May 27, 1959

He Spends Day on Stand

JONES CITED FOR CONTEMPT
DURING TAX CHARGE TRIAL

by Jim Henderson

NORFOLK—Industrialist Samuel G. Jones, Sr., drew a contempt citation Tuesday while defending himself against tax-evasion charges in U. S. District Court.

Judge Walter E. Hoffman deferred disposition of the contempt rule until the end of the tax case against the 65-year-old manufacturer.

Jones, who owns the foundry which hired him at 25 cents an hour four decades ago, was cited by Hoffman after using the word "nigger" in his testimony.

The jury of 12 regular and two alternate members contains one Negro.

Jury Sent Out

Hoffman excused the jury before issuing the rule.

"Mr. Jones," the judge told the defendant, "I don't think you have the right to use the terms you did in open court." He said he would treat the contempt action at the conclusion of the trial.

After the jury returned Jones told it: "I was raised up with colored people . . . I love the darky . . . as much as I do a white man."

"I understand you did not mean any disrespect." Hoffman said. Jones then continued his testimony.

The defendant, charged with evading nearly $277,000 in income taxes for himself and his firm, Berkley Machine Works and Foundry Inc., was being cross-examined by District Atty. John M. Hollis when court recessed for the day at 5 p.m.

He will go back on the witness stand at 10 a.m. today.

The industrialist has pleaded innocent to understating taxes for 1952 through 1954. Trial began May 18 and enters its ninth full day today.

Defends Integrity

During his testimony Jones hotly defended his integrity, offered Hollis $50,000 a year to run his foundry, and drew a rebuke from Hoffman for telling Hollis not to "abuse" him.

To one of Hollis' questions Jones answered:

"I'm not going to take any abuse from you."

"You're not above the law," Hoffman told Jones. "Answer the question."

* * * * * *

NORFOLK LEDGER-DISPATCH—
Wednesday Afternoon, May 27, 1959

Stern Warning From Bench

JONES CAUTIONED TO CHANGE CONDUCT ON WITNESS STAND OR FACE CONTEMPT ACTION

by Ralph Mulford

NORFOLK—Industrialist Samuel G. Jones Sr., was given a stern warning today that he will be held in contempt if he doesn't change his conduct on the witness stand.

Judge Walter E. Hoffman brought proceedings to an abrupt halt in Federal District Court, where Jones is facing charges of income tax evasion, when the 65-year-old executive said that he was "not going to be drug around" by U. S. Attorney John M. Hollis.

Hoffman excused the jury and told Jones that he had been sufficiently warned "not to try to take over this trial."

"The question of contempt is aside from the trial," said Hoffman, "and you are entitled to warning. You are going to answer Mr. Hollis with politeness. If there are any more comments from you, I will not predict what will happen to you. You are writing your own ticket."

Measuring his words, Hoffman described Hollis as a "respected attorney in this community" and said the

court had "reached the end of its rope" as to Jones' comments.

It was the second time the jury had been excused to give Jones warning. Tuesday afternoon, Hoffman rebuked him for using the word "nigger" in testimony, cautioning him that questions of "contempt" would be decided at the conclusion of the trial.

After lecturing Jones at 10:45 a.m. today, Hoffman called for a recess and suggested that Gordon E. Campbell, defense attorney, confer with his client.

The conference took place in the hall.

In stern tones, Campbell told Jones to "answer the questions directly" and without comment.

* * * * * *

F. Prejudicial Instruction to the Jury

In his instructions to the jury, the Trial Court employed the phrase "hide behind" relative to the fact that Petitioner had engaged an attorney and an accountant in the preparation of his income tax returns for each of the years involved; these instructions are set forth verbatim herein: (R. 286)

1. "It is *undisputed* that the Austin House was never used for corporate purposes; title was in Virginia Austin." (Italics supplied). Continuing, the Court said, "It is for the jury to determine whether or not the Austin House was to be used for corporate purposes." Continuing further, the Court stated, "If expenditures on the Austin House were made by the corporation and the house was not used for corporate purposes, it would be a fraudulent return if deductions were taken." It is quite apparent, therefore, that the

jury's function was pre-empted and they were compelled to conclude that the deductions for the Austin House were fraudulent. Having stated that it was undisputed that the Austin House was never used for corporate purposes and while the Court later explained that it was for the jury to determine whether or not the Austin House was to be used for corporate purposes, he destroys his explanation by informing the jury that if the expenditures were made by the corporation and the house was not used for corporate purposes, the return would be fraudulent if the deductions were taken; by so doing, the charge was tantamount to instructing the jury to find the Petitioner guilty of filing a false and fraudulent return. Such charge precluded the finding that the deductions were taken under an honest mistake or were taken because Petitioner believed that the corporation was entitled to such deductions under the circumstances. This aspect of the charges is aggravated by the Trial Court's observation that the "Austin House may have been transferred because the Internal Revenue Agents had started an investigation"; here, the Court unquestionably exceeded the bounds of judicial discretion by advising the jury of the Petitioner's intentions regarding one transaction to be associated with a different one. Furthermore, if Petitioner had *intended* to use the Austin House for corporate purposes, at the time of the expenditures, this would negate the element of willfulness and the jury should have been instructed. *Blumberg* v. *U. S.*, 222 Fed. 2d. 496, C.A. 5 (1955); *Wheatly* v. *U. S.*, 159 Fed. 2d. 599, C. A. 4 (1946).

In his charges, the Trial Court further instructed the jury: "In this connection, you were told that where a taxpayer makes a full and fair disclosure of all the

facts and has imparted this information to his attorney or accountant, and acts on good faith on any advice received from such attorney or accountant, the element of willfulness is then lacking and the taxpayer has a right to rely on such advice, but, as previously noted, it is the duty of the taxpayer to make a full and clear disclosure of all facts to his attorney or accountant, and if a full and fair disclosure of all facts was not made by the taxpayer, he cannot rely upon or hide behind the fact that the tax return was prepared by an attorney or accountant if it thereafter appears that the tax return was false."; in using the words "hide behind", the Court inferentially informed the jury that the Petitioner was endeavoring to conceal his fraud by virtue of the fact that the income tax returns for Berkley Machine Works & Foundry Co. were prepared by a registered accountant and that his personal income tax returns were prepared by an attorney. It should be observed, that this evidence was presented by the Government; there was no denial by the Petitioner that they were so prepared and there was no attempt by the Petitioner to place the blame on others in a way that could be construed that he attempted to "hide behind" these individuals.

The use of the word "false" in that portion of the charges precludes a finding that there were errors of inadvertence or mathematical errors of addition or subtraction, or even an oversight; a taxpayer, it is submitted, could submit incorrect or incomplete data to an accountant or attorney through honest mistake or simple forgetfulness; in such event, the return would not be false merely because someone else prepared it. This instruction would render every return prepared by an accountant or an attorney a false return in the event it was subsequently found to be incorrect.

G. Misleading Representations

The United States Attorney informed the Court and the jury that additional income, resulting from adjustments for capitalization of the cost of Berkley Manor and business machinery were not to be regarded as willful or fraudulent; (R. 49-53) the total tax, however, as presented to the jury by the United States Attorney, included these non-fraudulent adjustments which constituted the substantial part of the total deficiency.

II. APPEAL

Without mentioning the cumulative effect of the various aspects of the trial, the United States Court of Appeals for the Fourth Circuit merely considered each factor separately, and, based on this approach, the Court then concluded that Petitioner's substantial rights were not affected.

In considering the inclusion of admittedly non-fraudulent income, representing approximately 80% of the total deficiency, upon which the total additional taxes were computed, the Court of Appeals completely ignored the impact thereof upon the jury and disposed of this issue by stating:

> "The defendant urged, principally, on this appeal that he was denied a fair trial because a computation of corporate income tax deficiencies for the years in question included certain adjustments which the Government conceded were not fraudulent. The construction and operation of a third residence, which the Government conceded on the trial was used for corporate purposes, and the purchase of certain machinery and capital assets for the corporation had been expensed on the corporate books and deducted in computing cor-

porate income tax liabilities. The deduction of such capital items the Government conceded was not fraudulent, but their capitalization resulted in adjustments which made a substantial contribution to the overall deficiencies shown in computations which were offered in evidence by the prosecution and received without objection.

"The defendant complains that the effect of these computations was to suggest to the jury that all of the deficiencies of corporate income tax were attributable to corporate payment of the defendant's personal expenses and to inflate the apparent effect of the alleged fraudulent transactions.

"The prosecution was required to offer computations along the line that it did offer in order to show that full and proper returns would have resulted in larger tax obligations than those shown in the returns actually filed. *If that fact were not shown, the return, however fraudulent, would not have resulted in the evasion of any income tax liability.*" (Italics Supplied).

This statement (italicized) by the Court of Appeals is susceptible to only one interpretation and that is: there could be no willful evasion unless the non-fraudulent income was employed in computing the deficiencies; it is equally apparent that the statement is inherently inconsistent and results in an erroneous application of law. The fact that no evasion would have resulted by reason of the exclusion of non-fraudulent income is tantamount to finding that there was, in fact, no evasion at all.

The fact that the jury was informed that adjustments for capitalization were not to be regarded as fraudulent does not serve as a justification for predicating the claim of fraud on such income at a later

date during the trial; the fact that a lay jury is not conversant with such technicalities, imposed upon the District Attorney, and upon the Court as well, a duty to prevent a miscarriage of justice; the fact that Counsel for Petitioner overlooked this aspect of the proceeding, in no way, removes this responsibility. The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible. Canon 5, *Canons of Professional Ethics.* If we accept the view of the Court of Appeals, we are committed to the proposition that justice is restricted to the trial court, and if, by inadvertence or oversight, or even neglect of Counsel for the defense, a conviction is obtained, justice abruptly ceases; it also means that the Court of Appeals is powerless to remove or to correct such miscarriage of justice.

Even after the decision of the Court of Appeals for the Fourth Circuit was announced, adverse newspaper publicity and derision of Petitioner persisted unabated. Illustrative of this unwholesome atmosphere is the following article appearing in the Ledger-Dispatch, Norfolk, Virginia, under date of October 10, 1960:

NORFOLK LEDGER-DISPATCH—

Monday Afternoon, October 10, 1960

Appeal Lost

JONES MUST GO TO JAIL

NORFOLK—The conviction of Norfolk industrialist Sam Jones on income tax evasion has been upheld by the Fourth Circuit Court of Appeals.

In June, 1959, U. S. District judge Walter E. Hoffman sentenced the fiery, 65-year-old head of Berkley Machine Works to five years in prison and fined him $30,000.

Jones had been charged with evading over $276,000 in taxes.

The trial lasted nine lively days. Hoffman was forced to caution Jones repeatedly concerning his remarks to U.S. Attorney John M. Hollis.

Today, duing the course of a civil case, Hoffman interupted proceedings to congratulate Hollis, who has since turned to private practice.

"Mr. Hollis," he said, "you might be interested to know that I have just received word that the last case you tried as a U. S. Attorney has been upheld by the Fourth Circuit Court of Appeals."

The Judge added, amid laughter from the courtroom, that Hollis could now apply for that $50,000 a year job."

Hoffman utilized a new, flexible sentencing procedure in ordering Jones to prison for five years on each count of a six-count indictment (with sentences running concurrently).

By so doing, the jurist left the door open for him to modify the sentence following a six-month study of the defendant after his commitment.

REASONS FOR GRANTING WRIT OF CERTIORARI

It is a well recognized principle, inherent in our system of jurisprudence, that the Supreme Court of the United States supervises the administration of justice in the Federal Courts in matters of due process of law within the meaning of the Fifth Amendment to the Constitution of the United States. *Elkins and*

Clark v. *U. S.*, 126 Oct. Term 1959 ... U. S. ... 28 Law Week 4567; *Kotteakos* v. *U. S.*, 328 U. S. 750, 765.

The substantive factors bearing upon the question of due process consist of the following:

A. Improper Comments by Trial Judge

1. The ill advised comment by the Trial Judge, prior to the presentation of all of the evidence viz, that the case did not deal with "peanuts", was extremely prejudicial to the Petitioner and undoubtedly had the effect of influencing the jury in its determination of whether or not the Petitioner willfully attempted to evade a "substantial" part of his income taxes; under such circumstances, there is every reason to believe that this comment destroyed the objectivity of the jury's deliberations to the detriment of Petitioner.

2. The stern admonishment by the Court to Petitioner, while under cross examination, that he was "not above the law" also had a prejudicial effect upon the minds of the jury. The fact that Petitioner responded to the District Attorney's questions in an imprudent manner was not, it is submitted, sufficient justification for the severe remark that Petitioner was "not above the law".

B. Public Ridicule of Petitioner

1. The promptness with which the Trial Judge excused the jury following Petitioner's use of the word "nigger", also produced a prejudicial effect upon the jury; this incident was accentuated by the publicity accorded it by local newspapers.

2. By using evidence concerning the purchase of suppositories by the corporation, the District At-

torney either knew, or should have known, that such evidence would provoke laughter at Petitioner's expense; needless to say, Petitioner was embarrassed, and, from that time on, he was the subject of public ridicule.

C. Prejudicial Instructions

The instructions were not only inferentially unfavorable to Petitioner, as hereinbefore discussed, the Trial Judge also failed to instruct the jury to consider evidence favorable to the Petitioner, such as the fact that there were no omissions of gross income for any of the years involved; the Trial Judge also failed to instruct the jury that, under the law, expenses incurred by Petitioner in the operation of his farm were allowable deductions; the instructions were silent as to the extent to which adjustments for capitalization of farm equipment and machinery produced additional income in Petitioner's personal income tax returns. The Petitioner was entitled to have the evidence fairly and accurately stated, including that which was favorable as well as that which was unfavorable. *Davis* v. *U. S.*, 227 Fed. 2d. 568, C.C.A. 10 (1955).

D. Misleading Representations

Having represented to the Court and jury that adjustments for capitalization were not to be regarded as willful or fraudulent, it was incumbent upon the District Attorney to present the evidence fairly and accurately in accordance with such representations. It was the responsibility of the District Attorney to confine the computation of addi-

tional tax to the income allegedly evaded by Petitioner with willful intent; his failure to do so, precluded the possibility that the jury might have determined that Petitioner did not evade a substantial amount of taxes within the meaning of the Court's instructions.

E. Cumulative Effect of Errors

It is Petitioner's contention, that this Court may find a violation of the Fifth Amendment in any one of the several instances heretofore discussed in this Petition; it is unnecessary, however, to decide whether any one error violated the provisions of the Fifth Amendment. The proceedings, in their entirety, should be examined under the rule of the Kotteakos case; thus examined, it becomes readily apparent that Petitioner was denied a "fair trial".

When considered together, the Questions Presented so taint the proceedings in their cumulative effect as to constitute a denial of due process; this is true, even though, "standing alone", they may not, in and of themselves, constitute reversible error. This question has been fully answered in the case of *Kotteakos* v. *U. S., Supra,* wherein it was stated: "if one cannot say with fair assurance after pondering all that happened, without stripping the erroneous from the whole, the judgment was not substantially swayed by the error, it is impossible to concede that substantial rights were not affected". The application of this rule of substance to all of the facts with which we are here concerned, compels the conclusion that Petitioner's substantial rights were injuriously af-

fected and that, as a result thereof, he was denied due process of law.

CONCLUSION

Based on the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted

ELLSWORTH T. SIMPSON
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APPENDIX A.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7926

SAMUEL G. JONES, SR., *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk.
Walter E. Hoffman, District Judge.

(Argued September 26, 1960. Decided October 10, 1960.)

Before SOBELOFF, Chief Judge, and SOPER and HAYNSWORTH, Circuit Judges.

Ellsworth T. Simpson for Appellant, and Plato Cacheris, Assistant United States Attorney, (Joseph S. Bambacus, United States Attorney, on brief) for Appellee.

Opinion

HAYNSWORTH, Circuit Judge:

The defendant was convicted on each of six counts in an indictment charging the evasion of income taxes due by the defendant, and by a corporation owned and controlled by him, through the filing of false and fraudulent returns.

The Government's case was founded principally upon the fact that corporate funds had been used to construct and maintain two residences and in connection with the operation of a farm when such expenditures in fact served the defendant's individual purposes and inured to his benefit, but served no corporate purpose. The corporation did not own either of the residences or the farm. There were other miscellaneous corporate disbursements, said to have been only for the personal benefit of the defendant. All of these corporate expenditures were expensed on the corporation's books and deducted in computing its income tax

obligations for the years 1952, 1953 and 1954. The defendant did not include these disbursements as income to him in his individual returns for those years.

The defendant urged, principally, on this appeal that he was denied a fair trial because a computation of corporate income tax deficiencies for the years in question included certain adjustments which the Government conceded were not fraudulent. The construction and operation of a third residence, which the Government conceded on the trial was used for corporate purposes, and the purchase of certain machinery and capital assets for the corporation had been expensed on the corporate books and deducted in computing corporate income tax liabilities. The deduction of such capital items the Government conceded was not fraudulent, but their capitalization resulted in adjustments which made a substantial contribution to the overall deficiencies shown in computations which were offered in evidence by the prosecution and received without objection.

The defendant complains that the effect of these computations was to suggest to the jury that all of the deficiencies of corporate income tax were attributable to corporate payment of the defendant's personal expenses and to inflate the apparent effect of the alleged fraudulent transactions.

The prosecution was required to offer computations along the line that it did offer in order to show that full and proper returns would have resulted in larger tax obligations than those shown in the returns actually filed. If that fact were not shown, the return, however fraudulent, would not have resulted in the evasion of any income tax liability. The jury was clearly and repeatedly told that there was no claim of fraud or of wrongdoing in connection with the corporation's expensing disbursements for capital assets, nor was fraud inferable from income tax adjustments resulting from their subsequent capitalization. If the defendant had wished at the time of the trial, he could

have introduced a computation which would have shown exactly what contribution to the overall deficiencies had been made by the transactions which the prosecution claimed to have been fraudulent and by those transactions as to which the prosecution made no such claim. When the defendant at the trial undertook to offer no such computation, and failed to request one of the prosecution, he is hardly in a position now, on appeal, to complain that the prosecution did not show with mathematical precision the tax consequence of what was generally and clearly explained to the jury. The corporate deduction of disbursements in payment of the defendant's personal expenses clearly did contribute to the corporate deficiencies. The Government's proof showed that these disbursements exceeded $10,000 in each of the years 1952 and 1953, and exceeded $108,000 in 1954. When the proof showed that the corporate deficiencies resulted from a combination of the disallowance of personal expense items and the capitalization of certain corporate expenditures for corporate capital assets, the fairness of the trial was not impaired by the absence of a mathematical computation showing the relative contribution of each type of adjustment, a computation which the defendant during the trial neither offered nor requested.

The defendant complains of admission in evidence of a "Bride's Book" to show the receipt of a wedding present, this being one of the small items of personal expense charged to have been made by the corporation for the benefit of the defendant. The record was received in evidence under the "Shop Book Rule."[1] Whether the "Bride's Book" qualified for admission in evidence under the rule, we need not consider, however, for the defendant admitted that he sent the present to the bride and paid for it with corporate funds. The receipt of this evidence as to this very small item in no way prejudiced the defendant or his defense.

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[1] 28 USCA 1732.

Next the defendant complains that the prosecution used notes made after an interview with a witness to refresh the witness's recollection. The notes were not offered in evidence and their use only for the purpose of refreshing the witness's recollection was unobjectionable.[2]

Next the defendant complains of the receipt of evidence that the defendant said in 1957 of one of the personal residences that he intended to use it as his own. His position is that his intention in 1957 had nothing to do with what his intention was when it was constructed with corporate funds in 1954. When the proof showed the residence never had been used for any corporate purpose, however, evidence of the defendant's declaration in 1957 that he intended it for personal use could be considered by the jury in determining what the intention was at the time the residence was constructed. It was clearly explained to the jury that the defendant's guilt or innocence depended upon what he had in contemplation when he acted in 1954.

The defendant also complains of two isolated comments by the trial judge made in this very lengthy trial, comments to which no objection was made at the time and which, we, upon examination, find unobjectionable and unprejudicial.

Finally, complaint is made of supposed deficiencies in the charge. Though no objection was made to the charge at the time as required by Rule 30 of the Federal Rules of Criminal Procedure, we have examined the entire charge and find that it fully and fairly submitted the case to the jury.

The defendant's counsel has searched the record painstakingly for a basis for a new trial. We have considered all of his contentions, but find no error affecting substantial rights of the defendant.

Affirmed.

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[2] United States v. Rappy, 2 Cir., 157 F. 2d 964.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

No. Cr. 11-763

UNITED STATES OF AMERICA

v.

SAMUEL G. JONES, SR.

[Filed June 8, 1959]

Judgment and Commitment

On this 8th day of June, 1959 come the attorney for the government and the defendant appeared in person and[1] by counsel.

IT IS ADJUDGED that the defendant has been convicted upon his plea of[2] Not Guilty and a verdict of Guilty of the offense of violation of Section 145(b), Internal Revenue Code; 26 U.S.C. Section 145(b); Section 7201, Internal Revenue Code of 1954; 26 U.S.C. 7201 (Income Tax Evasion) as charged[3] in the Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

It is the judgment of the Court that the defendant, Samuel G. Jones, Sr., do pay the cost of this prosecution and, as to each of the six counts of said indictment, that he pay a fine of $5,000.00, making an aggregate fine in the sum of $30,000.00, and that he stand committed for non-payment of said fine. It is further the judgment of the Court that, in accordance with the provisions of Title 18, Section 4208 (b), U.S.C., the defendant, Samuel G. Jones, Sr., be and he is hereby committed to the custody of the Attorney Gen-

eral, which commitment shall be deemed to be for a period of five years on each of said counts of said indictment, but to run concurrently; said commitment being for the purposes of a study as described in Title 18, Section 4208(c), U.S.C., and which said commitment is subject to modification as provided by Title 18, Section 4208(b), U.S.C., after receipt of the report and recommendations from the Director of the Bureau of Prisons and the Board of Parole. The Attorney General and Director of the Bureau of Prisons are granted a maximum period of six months within which to make the study as provided by law, and to file the required report and recommendations.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshall or other qualified officer and that the copy serve as the commitment of the defendant.

Walter E. Hoffman
United States District Judge

The Court recommends commitment to:"

Walkley E. Johnson
Clerk

E COPY

Office-Supreme Court, U.S.
FILED
MAR 3 1961
JAMES R. BROWNING, Clerk

No. 558

In the Supreme Court of the United States

OCTOBER TERM, 1960

SAMUEL G. JONES, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
LOUIS F. OBERDORFER,
Assistant Attorney General,
MEYER ROTHWACKS,
LAWRENCE K. BAILEY,
Attorneys,
Department of Justice, Washington 25, D.C.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 1a–4a) is reported at 282 F. 2d 745.

JURISDICTION

The judgment of the Court of Appeals was entered on October 10, 1960. (Pet. 1a.) The petitioner was granted an extension of time in which to file his petition for certiorari until December 4, 1960. (Pet. 1.) The petition was filed on December 1, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was denied a fair trial on a charge of tax evasion where the government's computation of corporate tax deficiencies included non-fraudulent adjustments and the trial judge specifically instructed the jury that the government had not contended that these adjustments "were in any sense criminal in nature."

2. Whether the trial judge's other rulings and conduct of the trial deprived petitioner of a fair trial.

STATUTES AND RULES INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U.S.C. 1952 ed., Sec. 145.)

Internal Revenue Code of 1954:

SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

(26 U.S.C. 7201.)

Federal Rules of Criminal Procedure:

RULE 30.

INSTRUCTIONS

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

RULE 52.

HARMLESS ERROR AND PLAIN ERROR

* * * * *

(b) *Plain Error.* Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT

Petitioner was indicted in the United States District Court for the Eastern District of Virginia for a willful attempt to evade his individual income taxes (Counts I, III, V) and the corporate income taxes of the Berkley Machine Works and Foundry Company, of which he was president and principal stockholder (Counts II, IV, VI), for the years 1952, 1953, and 1954, in violation of Section 145(b) of the Internal Revenue Code of 1939 and Section 7201 of the Internal Revenue Code of 1954, *supra*, pp. 2–3. (I R. 3–7.)[1]

The evidence adduced at the ten-day trial before a jury demonstrated that petitioner had used corporate funds for the following purposes: to construct two residences in North Carolina (Samjo Manor and the Austin House) at a cost of $34,686.28 for labor and $55,772.39 for materials, or a total of $90,458.67 (II R. 388–405, 423–424, 458); to maintain in large measure his own rural 290-acre homeplace (Sajo Farms)

[1] "I R." refers to the "Appellant's Appendix" in the court of appeals below; "II R." refers to the "Appendix for Appellee"; "Tr." preceded by a volume number refers to the seven volumes of the reporter's typewritten transcript of the trial, on file with this Court.

(II R. 303–330); and to pay for such personal items as rent on his sister's apartment, tailor-made suits and haberdashery, and personal household articles (II R. 20–33, 168–169, 331–344). At petitioner's direction (II R. 176, 195–196, 213; III Tr. 770–771), and following his alteration of some of the corporate records (II R. 267–272, 398–403, 503–508), the foregoing personal expenditures were charged to corporate expense accounts for "freight", "foundry" repairs, and "sales promotion" (II R. 303–357) or disguised as costs of Berkley Manor, a corporate property (II R. 195, 391–406).[2] All of these alleged corporate expenditures were expensed on the corporation's books and deducted in computing its income tax obligations for 1952, 1953, and 1954 (Pet. 1a–2a); none of the amounts disbursed for petitioner's own personal benefit was included as income on petitioner's own personal returns (II R. 302, 450–469).[3]

Petitioner was found guilty, and a judgment of conviction was entered against him on June 8, 1959. He was sentenced to concurrent terms of five years on each count and an aggregate fine of $30,000. The

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[2] As noted by the Court of Appeals (Pet. 2a), "The construction and operation of a third residence [other than Samjo Manor and the Austin House], which the Government conceded on the trial was used for corporate purposes, and the purchase of certain machinery and capital assets for the corporation had been expensed on the corporate books and deducted in computing corporate income tax liabilities. The deduction of such capital items the Government conceded was not fraudulent, but their capitalization resulted in adjustments which made a substantial contribution to the overall deficiencies shown in computations which were offered in evidence by the prosecution and received without objection."

[3] The government's computation at the trial showed the fol-

court reserved authority to modify the sentence or grant probation within a six-month period after study by the Bureau of Prisons. (Pet. 5a–6a.)

The Court of Appeals affirmed the judgment of conviction, finding "no error affecting substantial rights of the defendant." (Pet. 4a.)

ARGUMENT

1. Petitioner's chief complaint is that the government's computations of corporate income tax deficiencies reflected the capitalization of items which had been originally expensed (Pet. 20–22) and which were concededly non-fraudulent (Pet. 2a). But the government was required to present the computations in the form they were offered in order to disentangle the financial picture of the corporation from that of petitioner and to show the correct corporate income and tax. Moreover, these computations were not prejudicial to petitioner.

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lowing amounts of reported and corrected net income and tax liability (II R. 432–460, 563, 565):

Count	Year	Reported		Corrected	
		Income	Tax	Income	Tax
Individual:					
I	1952	$15,651.61	$3,661.56	$26,124.42	$7,747.72
III	1953	15,999.74	3,779.92	24,232.69	6,933.74
V	1954	12,946.73	2,498.20	119,372.46	66,819.34
Corporation:					
II	1952	4,410.94	1,323.28	52,048.17	22,904.23
IV	1953	29,818.16	10,005.44	74,415.13	40,836.41
VI	1954	29,527.35	9,854.22	68,342.93	30,038.32

The foregoing figures include non-fraud adjustments with respect to the corporation's "corrected" figures.

The trial court explicitly admonished the jury—not only when the computations were admitted but twice in the final instructions—that the government did not contend that the expensing of the ultimately capitalized items involved "any suggestion or intimation that that was any criminal act on the part of the defendant" (II R. 358-359, 367) or "were in any sense criminal in nature" (I R. 293, 297). Petitioner's counsel himself referred to the items as having "no bearing, as the Court has told the jury, on the criminal intent, but only as it affected an understatement of taxes, of income" (I R. 129.) Contrary to petitioner's assertion (Pet. 21) that the Court of Appeals concluded, in effect, that "there could be no willful evasion unless the non-fraudulent income was employed in computing the deficiencies," the fact is that the court below, in a portion of the opinion which petitioner fails to quote, stated that the government's proof of corporate disbursements for petitioner's personal purposes—exceeding $10,000 in each of the years 1952 and 1953, and $108,000 in 1954—"clearly did contribute to the corporate deficiencies" and that "the fairness of the trial was not impaired by the absence of a mathematical computation showing the relative contribution of each type of adjustment, a computation which the defendant during the trial *neither offered nor requested*" (Pet. 3a (emphasis added)).*

* The court also pointed out that "[i]f the defendant had wished at the time of the trial, he could have introduced a computation which would have shown exactly what contribution to the overall deficiencies had been made by the transactions which the prosecution claimed to have been fraudulent and by those transactions as to which the prosecution made no such claim. When the defendant at the trial undertook to offer no such

This holding by the Court of Appeals was consonant with the rule of law in such cases that "[i]t is not necessary to prove that there was a particular amount of tax evaded nor need the computations be exact in an accounting sense." *United States* v. *Nunan*, 236 F. 2d 576, 586 (C.A. 2d), certiorari denied, 353 U.S. 912; accord, *United States* v. *Johnson*, 319 U.S. 503, 517.

2. Petitioner's objections to the District Court's conduct of the case are not well grounded and provide no basis for petitioner's assertion that he was denied a fair trial.

(*a*) The trial court's statement that "[w]e, of course, are not dealing in this case with peanuts" was intended to inform the jury that a prerequisite to conviction on the offenses charged was the understatement of a *substantial* amount of income. (I R. 167.) Petitioner's counsel did not object to the court's explanation; on the contrary, satisfied that the allegedly derogatory term was used in the context of a proper and necessary explanation as to what constituted a substantial understatement of income, counsel advised the court: "All right, we will forget about it." (I R. 167–168.) Nor did counsel take any exception to the trial court's comprehensive final instruction concerning the meaning of the term "substantial." (I R. 288–289.)

Similarly, the trial judge's warning to petitioner that "you are not above the law" (II R. 502) was an

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computation, and failed to request one of the prosecution, he is hardly in a position now, on appeal, to complain that the prosecution did not show with mathematical precision the tax consequence of what was generally and clearly explained to the jury." (Pet. 2a–3a.)

appropriate observation when considered in context. The record shows that petitioner, instead of answering questions, insisted upon questioning the questioner (II R. 475, 484, 489, 494, 521); volunteered criticisms (II R. 479, 482, 483, 495, 531); repeatedly castigated the prosecutor (II R. 478, 489, 517, 522, 532, 543); and proved himself to be difficult even to his own counsel (I R. 188, 192, 204, 209, 211–212, 216; see II R. 473, 520, 531–533). Consequently, the trial judge felt constrained to admonish petitioner repeatedly (I R. 175, 205; II R. 478, 489, 517, 522, 525, 533); even petitioner's own counsel was forced to request him to "just answer the question" on many occasions during his own examination of petitioner (I R. 176, 181, 195) and during cross-examination (II R. 517, 524, 527, 528). Ultimately, the trial judge was forced to warn petitioner, out of the presence of the jury, that if petitioner persisted in his demeanor he would be held in contempt. (II R. 534.) Under the circumstances, the trial court's advice to petitioner that he was "not above the law" was certainly appropriate. Indeed, even petitioner admits that the warning was provoked because he had responded to questions "in an imprudent manner." (Pet. 24.)

(*b*) If petitioner suffered "public ridicule," as he contends (Pet. 11, 24–25), because of the publicity attending certain matters arising out of his trial, the short answer is that they were matters of his own doing. Thus, the reference to the use of corporate funds to purchase suppositories for his own use was a necessary, albeit small, part of the government's evidence showing that corporate funds had been improperly

expended to procure for petitioner many items of a personal nature, including salad plates, lamp shades, a tea and coffee service, a food mixer, juice extractors, wine glasses, an outdoor grill, an R.F.D. mailbox, shoes, horseback riding accessories, an oil painting, diamonds and rubies used in remodeling jewelry, sport coats, tailor-made suits, and haberdashery. (II R. 331–344.) Similarly, if it embarrassed petitioner to have factual newspaper reports of the criticism leveled at him by the trial court—outside the presence of the jury—for using the word "nigger" (a member of the Negro race had been on the jury (I R. 215)), that, too, was a matter of his own doing. The Court of Appeals was therefore correct in refusing to permit petitioner to raise the charges of ridicule as a basis for reversible error.

(c) Finally, prejudicial error cannot be premised upon isolated words and phrases of the trial court's instructions (see Pet. 17–19) or upon its failure to instruct where no instructions had been requested and none needed (see Pet. 25). Petitioner misreads the instructions that were given; in context, they constitute a full statement of the basic and required directions in a tax evasion case. Counsel made no objection to them at the trial[5] (VII Tr. 1714), as he was required to do by Rule 30, F.R. Crim. P., *supra,* p. 3. Nor are the matters complained of here "[p]lain errors * * * affecting substantial rights," for which no objection is needed to be noticed by the court (Rule

[5] Petitioner's single exception to the instructions was with respect to an issue not urged in his petition. (VII Tr. 1714.)

52(b), F.R. Crim. P., *supra*, p. 4), rather, they indicate nothing more than a belated quest for error in a ten-day trial which was carefully conducted.*

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.
LOUIS F. OBERDORFER,
Assistant Attorney General.
MEYER ROTHWACKS,
LAWRENCE K. BAILEY,
Attorneys.

MARCH 1961.

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* Petitioner also complains about several rulings on the admission of evidence. Thus, he complains (Pet. 11) of admission, under the "shop book rule," of the "Bride's Book," establishing receipt by petitioner's niece of wedding gifts from petitioner which had been paid for by the corporation. This admission could not have prejudiced petitioner's case, since petitioner admitted these same facts. (II R. 512–513.) Moreover, it was petitioner's own counsel who had requested that the book be produced as "the best evidence". (II Tr. 339.) Similarly, there is no merit to petitioner's complaint (Pet. 3, 11–12) respecting the use of an agent's notes to refresh a witness' recollection, since it is an elementary principle that anything which will serve to revive a memory can be used for that purpose. *United States* v. *Riccardi*, 174 F. 2d 883, 888 (C.A. 3d), certiorari denied, 337 U.S. 941. Finally, there is no merit to petitioner's further complaint (Pet. 3, 12) respecting testimony on rebuttal about a 1957 conversation (I R. 280). This testimony was clearly admissible on the issue of credibility, since petitioner, while testifying, had categorically denied that such a conversation had taken place. (II R. 530–532.)

U. S. GOVERNMENT PRINTING OFFICE: 1961